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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

NO. 73-1633

TIMOTHY O'CONNELL,
Appellant-Petitioner.

vs.

STATE OF OHIO,
Appellee-Respondent.

MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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MOTION TO AFFIRM OR DISMISS

The Appellee-Respondent moves the Supreme Court of the United States to dismiss the appeal herein, or, in the alternative to affirm the judgment of the Supreme Court of Ohio and the Court of Appeals of Ohio for the First Appellate District, on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

OPINION BELOW

The opinion of the Supreme Court of Ohio and of the Court of Appeals, First Appelate District of Ohio appear in Petitioner's Appendix thereto at pages seven through eleven respectively.

STATEMENT OPPOSING JURISDICTION

Jurisdiction does not lie with respect to the instant petition presented by Appellant-Petitioner for the reasons enumerated below:

a. Petitioner presents no statutory, factual or constitutional issues as a basis for granting certiorari.

b. The decisions rendered by the courts below with respect to the facts as presented in the case at bar are correct for there was no custodial interrogation nor confession elicited.

c. There was no objection raised by the defense at trial to the admission of instant petitioner's voluntary statements and thus waiver accrues notwithstanding the fact that said admission was voluntary.

Wherefore, Appellee-Respondent through a Motion to Affirm or Dismiss, herein contained moves this Honorable Court to dismiss Appellant-Petitioner's application for writ of certiorari, for lack of jurisdiction based upon the fact that the provisions of *Miranda* v. *Arizona,* 384 U.S. 436 (1966), are not applicable to the case at bar.

QUESTION PRESENTED

Where a police officer stopped a traffic offender for the purposes of discussing a 'hit-skip' auto accident involving the defendant's vehicle results in the defendant's voluntary response that he was the driver of the car, the admission of said affirmative response into evidence without objection is proper as being non-custodial and outside the scope of *Miranda* v. *Arizona,* 384 U.S. 436, 86 S.Ct. 1602 (1966).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Ohio Revised Code, Section 4549.02, stopping after accident; exchange of identity and vehicle registration, are set forth in Appellant-Petitioner's petition at page two therein.

STATEMENT OF THE CASE

On December 11, 1972 the instant defendant struck another automobile with such force that the victim's auto was pushed over the curb into a pole on the sidewalk. The defendant did not stop to leave his name and address as required by statute but instead proceeded on. The victim had obtained the license number of the vehicle in question and had given this along with a description of the automobile to the police.

At trial the victim of the collision testified that the instant defendant later came to the place of business where the victim worked and identified himself as the defendant, Timothy O'Connell, also stating that he was the driver of the vehicle involved in the collision. The victim further testified at trial that a description of the defendant and the auto with the license number was given to the police. An in-court identification of the defendant was made by the victim at the trial.

Also testifying at trial was a police officer who observed the defendant's automobile bearing the exact license number as that reported to be involved in the 'hit-skip' auto accident. After observing this license number only a short period after the reported accident the officer stopped the vehicle in question.

The officer testified at trial that he asked the defendant "if he had been driving the vehicle within the last two hours?" The defendant stated to the officer, "Yes I have." The officer further asked the defendant if he had been at or near the intersection of the accident and Mr. O'Connell replied, "Yes, I think so." When asked by the officer if he was aware of an accident that had taken place at the intersection in question, the defendant stated, "maybe". Defendant also stated to the police officer that he "did recall an accident at this time." Instant defendant also indicated to the officer that he "didn't know why" he did not stop after the collision. Subsequently the police officer handed to the defendant a traffic citation to appear in court at a later date. No arrest was made.

The defendant also testified at trial that he was driving said auto at the time and location in question and that there were paint chips on his auto matching the color of the victim's vehicle. Defendant admitted at trial that the auto he was driving was heavily damaged after the collision.

At no time was there an objection by the defense to the testimony given by the police officer or by the victim of the accident. Subsequently petitioner at bar was found guilty of leaving the scene of an auto accident. After the trial the defendant admitted being previously convicted of "leaving the scene of an accident" in January of 1972 and also of drunken driving. Consequently, a presentence investigation was ordered by the court prior to sentencing.

THERE IS NO SUBSTANTIAL CONSTITUTIONAL QUESTION HEREIN INVOLVED AND THIS CASE IS NOT OF GREAT OR GENERAL PUBLIC INTEREST.

Clearly, this case does not involve any constitutional issue but instead is merely a weight of the evidence question. The instant defendant did not deny involvement in the auto accident but only stated that he was not cognizant of the occurrence of the accident at the time it happened.

By the defendant's own admission at trial he testified that his vehicle was heavily damaged and contained paint chips from the other vehicle involved in the collision. The force of the impact of collision was so great that defendant's vehicle caused the victim's auto to crash into a pole located on the sidewalk.

The weighing of the testimony and credibility of the witnesses lies within the sole discretion of the trier of fact and where the defendant admits the accident but denies knowledge at the time of collision there can be no violation of any constitutional guarantee. The only issue concerns "scienter" which is a matter of fact to be proved at trial and the factual situation now before this Honorable Court does not demonstrate error.

The decision below is correct without regard for the questions sought to be raised by the petition and in view of all facts this case clearly does not warrant review by the Supreme Court of the United States. There is no substantial constitutional question herein involved and this case is not of great or general public interest as the very nature of the issues raised are not of constitutional magnitude.

REASON FOR DENIAL OF WRIT

I

WHERE A POLICE OFFICER STOPPED A TRAFFIC OFFENDER FOR THE PURPOSES OF DISCUSSING A 'HIT-SKIP' AUTO ACCIDENT INVOLVING THE DEFENDANT'S VEHICLE RESULTS IN THE DEFENDANT'S VOLUNTARY RESPONSE THAT HE WAS THE DRIVER OF THE CAR, THE ADMISSION OF SAID AFFIRMATIVE RESPONSE INTO EVIDENCE WITHOUT OBJECTION IS PROPER AS BEING NON-CUSTODIAL AND OUTSIDE THE SCOPE OF MIRANDA v. ARIZONA, 384 U.S. 436, 86 S. Ct. 1602 (1966).

The police officer stopped the defendant because the vehicle in question matched the description and license number of the 'hit-skip' vehicle involved in an auto accident within the last hour. The defendant merely cooperated voluntarily and there is not even the slightest suggestion or testimony supporting an allegation of "in-custody" atmosphere.

Petitioner was never arrested and in fact was only given a traffic citation and was free to go at all times. Defendant freely and voluntarily admitted that he had been the driver of the auto and that he was in the area when the collision took place. When the officer asked the defendant if he was "aware of an accident that had occurred at said intersection", Mr. O'Connell replied "Maybe". Within the same conversation defendant admitted that he "did recall an accident at this time".

Applying the test of whether a reasonable man would consider his freedom seriously impaired it must be con-

cluded that the officer's brief and "non-coercive" inquiry of the defendant was not "custodial" and did not, therefore, require Miranda warnings. In order for inquiry absent an actual arrest to be "custodial," the police must manifest that they would not heed a request to depart. *U.S.* v. *Hall,* 421 F.2d 540, 545 (2 Cir. 1969), cert. denied, 397 U.S. 990 (1970).

In considering the totality of the circumstances:

1. There was a complete absence of restraint of petitioner's liberty;
2. The inquiry was routine and courteous in character;
3. The petitioner voluntarily cooperated with the police by freely admitting that he did recall the accident.
4. There was no interrogation or station-house questioning.
5. The inquiry was shortly after the accident took place.

there is absolutely no showing of facts which would warrant warnings under the Miranda requisites.

To recapitulate then, we have here a clear situation of a brief and non-coercive inquiry shortly after the occurrence of the traffic accident in an attempt to ascertain the surrounding circumstances. The facts of the case at bar are devoid of any hint of custodial interrogation for there was no deprivation of freedom. *Lowe* v. *U.S.,* 407 F. 2d 1391 (9 Cir. 1969).[1]

Furthermore, because an objection or motion has not been raised at the trial level and therefore waived, the

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[1] *Lowe* v. *U.S.,* 407 F. 2d 1391 (9 Cir. 1969), citing *Miranda* v. *Arizona,* 384 U.S. 436 at 444 (1966).

issues now sought to be raised upon appeal are not preserved.

Wherefore, in applying those standards as set forth in *Miranda,* it is evident that the responses of the defendant are of the type specifically excepted from the coverage of *Miranda* v. *Arizona,* 384 U.S. 436, 86 S. Ct. 1602 (1966).

CONCLUSION

For the reasons set forth above, petitioner's writ of certiorari should be denied.

Respectfully submitted,

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